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Supreme Court, U.S.
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No. 91-A-601

In The
Supreme Court of the United States

October Term, 1990

FLOYD W. BYBEE, AFTON JANE IZEN,
JOE ALFRED IZEN, JR., AND
LAWRENCE E. SCHOEFFLER,
Petitioners,

v.

BANK ONE, MILWAUKEE, N.A.,
Respondent.

On Writ of Certiorari to the Arizona Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

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This Court has no jurisdiction over this petition for certiorari; in any case, it is without merit.

1. This was an eviction (forcible detainer) action filed against petitioner Schoeffler in the Superior Court of Maricopa County, Arizona. The federal question regarding the forcible detainer statute sought to be presented here was not mentioned at the trial court. (The Arizona Forcible Entry and Detainer statute is found at Arizona Revised Statutes (hereafter A.R.S.) §§ 12-1171 *et seq.*; *see* Appendix A.) In view of the fact that petitioner Schoeffler does not comply at

all with this Court's Rule 14.1(h), Rules of the Supreme Court of the United States, requiring specific reference to the exact portions of the record showing the raising and ruling on the federal question, we do not burden the Court with an appendix to prove the negative. [1] The superior court ordered the eviction. The superior court is the last, as well as the only, court in Arizona which ever passed on the merits of petitioner Schoeffler's defenses, which, as noted, did not include the asserted federal question. This Court, therefore, has no jurisdiction under 28 U.S.C. § 1257.

2. Petitioner Schoeffler, losing in the state trial court, filed a petition for special action in the Arizona Court of Appeals. Under the Arizona practice, this amounts to a petition for either mandamus or prohibition. Rule 1, Arizona Rules of Procedure for Special Actions, 17B A.R.S., p. 190. Acceptance of jurisdiction is, like a petition for writ of certiorari to this Court, discretionary. *See* Rule 3, *id.*, State Bar Committee Note ("highly discretionary"), p. 200. As the petition appendix shows, p. 5a, the Arizona Court of Appeals "decline[d] to accept the jurisdiction in this special action," and the Arizona Supreme Court denied the petition for review, *id.*, p. 7a. As well as not raising the federal constitutional question at the state trial court level, petitioner Schoeffler did not raise the issue at the state court of appeals level. Again, petitioner Schoeffler has not complied with Rule 14.1(h) regarding the proceedings at the Arizona Court of Appeals. Although the same rule was further ignored by petitioner Schoeffler regarding the Arizona Supreme Court proceedings, we concede that the federal question was raised

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[1] Petitioner Lawrence Schoeffler was the sole defendant in the forcible detainer action. The other petitioners here, Floyd Bybee, Afton Izen, and Joe Izen, Jr., were his legal counsel. When "petitioner Schoeffler" is used herein, it refers to actions or arguments raised by him or made on his behalf by the other petitioners.

Contrary to petitioners' list of parties below, petition, p. ii, Deborah Fine was not a party to the proceedings at any stage; she was counsel for Bank One, Milwaukee, N.A.

in the petition for review to the Arizona Supreme Court. Nevertheless, it was never passed on. The Arizona Supreme Court may have declined review for any number of reasons, one of which may perfectly well have been that the question had not been timely raised. *See Schoenfelder v. Arizona Bank*, 165 Ariz. 79, 88, 796 P.2d 881, 890 (1990).

3. Petitioner Schoeffler's complaint is frivolous. The trial court gave summary judgment against him. Petitioner Schoeffler contends here that there were disputed questions of fact. The sole argument of petitioner Schoeffler is that he was entitled to a "hearing" before eviction, relying entirely on *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), which invalidated prejudgment replevins without hearing. Petitioner Schoeffler does not comprehend that a summary judgment proceeding *is* a hearing and that *Fuentes* has no relevance at all. It is too late in the day to argue about the constitutionality of summary judgment and Rule 56 of the Rules of Civil Procedure. *See Fidelity & Deposit Co. v. United States to Use of Smoot*, 187 U.S. 315, 320, 23 S. Ct. 120, 47 L. Ed. 194 (1902); 10 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2714 (1983). No federal question peculiar to this case is raised on the papers.

4. The Arizona Supreme Court denied the petition for review on September 24, 1990 (the only stage at which petitioner Schoeffler raised the constitutionality of the summary judgment). The order assessing a charge against petitioners Bybee, A. Izen and J. Izen, Jr., for a frivolous appeal was entered on October 9, 1990. Rehearing was sought solely on the latter order. Petition appendix, p. 12a. The 90-day period for the petition for certiorari from the September 24, 1990 order, as prescribed in 28 U.S.C. § 2101(c), expired on December 22, 1990. On February 11, 1991, petitioners applied for an extension for filing their petition for certiorari. On February 13, 1991, this Court *ex parte* granted an extension of time to file a petition for a writ of certiorari, the petitioners' application claiming that the proper due

date for the petition of certiorari was February 12, 1991. This was far past the 90 days after the decision of the Arizona Supreme Court denying the petition for review, as to which there was no petition for rehearing (indeed such a motion would not have been permitted in the Arizona practice absent specific permission, Rule 22(d), Arizona Rules of Civil Appellate Procedure, 17 A.R.S., p. 61). Under Rule 30.2 of this Court, the extension of time "must be presented to the Clerk within the period sought to be extended," and so far as the denial of the petition for review is concerned, the application was too late. Moreover, under the same rule of this Court, the application for certiorari on the sanctions issue was filed one day before the filing date and there were no "extraordinary circumstances" presented for waiving the normal 10-day requirement.

5. On the sanctions question, the issue raised by petitioners is that Appellate Rule 25, Ariz. Rules of Court, p. 276, [2] permitting sanctions for frivolous appeals, is invalid for want of hearing. The rule is, in this respect, parallel to F.R.A.P. 38. With a frivolous appeal (as distinguished from bad faith or want of sufficient inquiry), all matters are before the Court on the face of the documents and some penalty, without proliferating the litigation into further stages, has been the practice throughout this century. *See* 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* § 3984 (1977); *Hill v. Norfolk & Western Railway Co.*, 814 F.2d 1192, 1200 (7th Cir. 1987); *Toepfer v. Dept. of Transportation*, 792 F.2d 1102 (Fed. Cir. 1986).

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[2] Appellate Rule 25, Arizona Rules of Court, states:

> Where the appeal is frivolous or taken solely for the purpose of delay, or where a motion is frivolous or filed solely for the purpose of delay, or where any party has been guilty of an unreasonable infraction of these rules, the appellate court may impose upon the offending attorneys or parties such reasonable penalties or damages (including contempt, withholding or imposing of costs, or imposing of attorneys' fees) as the circumstances of the case and the discouragement of like conduct in the future may require.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

RESPECTFULLY SUBMITTED.

LEWIS AND ROCA

April, 1991. By _____

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APPENDIX A

§ 12-1171. Acts which constitute forcible entry or detainer

A person is guilty of forcible entry and detainer, or of forcible detainer, as the case may be, if he:

1. Makes an entry into any lands, tenements or other real property, except in cases where entry is given by law.

2. Makes such an entry by force.

3. Wilfully and without force holds over any lands, tenements or other real property after termination of the time for which such lands, tenements or other real property were let to him or to the person under whom he claims, after demand made in writing for the possession thereof by the person entitled to such possession.

§ 12-1172. Definition of forcible entry

A "forcible entry," or an entry where entry is not given by law within the meaning of this article, is:

1. An entry without the consent of the person having the actual possession.

2. As to a landlord, an entry upon the possession of his tenant at will or by sufferance, whether with or without the tenant's consent.

§ 12-1173. Definition of forcible detainer; substitution of parties

There is a forcible detainer if:

1. A tenant at will or by sufferance or a tenant from month to month or a lesser period whose tenancy has been terminated retains possession after his tenancy has been terminated or after he receives written demand of possession by the landlord.

2. The tenant of a person who has made a forcible entry refuses for five days after written demand to give possession to the person upon whose possession the forcible entry was made.

3. A person who has made a forcible entry upon the possession of one who acquired such possession by forcible entry refuses for five days after written demand to give possession to the person upon whose possession the first forcible entry was made.

4. A person who has made a forcible entry upon the possession of a tenant for a term refuses to deliver possession to the landlord for five days after written demand, after the term expires. If the term expires while a writ of forcible entry applied for by the tenant is pending, the landlord may, at his own cost and for his own benefit, prosecute it in the name of the tenant.

§ 12-1173.01. Additional definition of forcible detainer

A. In addition to other persons enumerated in this article, a person in any of the following cases who retains possession of any land, tenements or other real property after he received written demand of possession may be removed through an action for forcible detainer filed with the clerk of the superior court in accordance with this article:

1. If the property has been sold through the foreclosure of a mortgage, deed of trust or contract for conveyance of real property pursuant to title 33, chapter 6, article 2.[1]

2. If the property has been sold through a trustee's sale under a deed of trust pursuant to title 33, chapter 6.1.[2]

3. If the property has been forfeited through a contract for conveyance of real property pursuant to title 33, chapter 6, article 3.[3]

4. If the property has been sold by virtue of an execution and the title has been duly transferred.

5. If the property has been sold by the owner and the title has been duly transferred.

B. The remedies provided by this section do not affect the rights of persons in possession under a lease or other

possessory right which is superior to the interest sold, forfeited or executed upon.

C. The remedies provided by this section are in addition to and do not preclude any other remedy granted by law.

[1]Section 33-721 et seq.

[2]Section 33-801 et seq.

[3]Section 33-741 et seq.

§ 12-1174. Immateriality of time possession obtained by tenant

It is not material whether a tenant received possession from his landlord or became his tenant after obtaining possession.

§ 12-1175. Complaint and answer; service and return

A. When a party aggrieved files a complaint of forcible entry or forcible detainer, in writing and under oath, with the clerk of the superior court or a justice of the peace, summons shall issue no later than the next judicial day.

B. The complaint shall contain a description of the premises of which possession is claimed in sufficient detail to identify them and shall also state the facts which entitle the plaintiff to possession and authorize the action.

C. The summons shall be served at least two days before the return day, and return made thereof on the day assigned for trial.

§ 12-1176. Demand for jury; trial procedure

A. The clerk or justice of the peace shall at the time of issuing the summons, if requested by the plaintiff, issue a venire to the sheriff or constable of the county commanding him to summon a jury of eight persons, if the proceeding is in the superior court, and six persons, if in the justice court, qualified jurors of the county, to appear on the day set for trial to serve as jurors in the action. The venire shall be served and returned on the day assigned for trial. The trial

date shall be no more than five judicial days after the aggrieved party files the complaint.

B. If the plaintiff does not request a jury, the defendant may do so when he appears, and the jury shall be summoned in the manner set forth in subsection A.

C. If any jurors fail to attend, or are excused after being challenged, the jury shall be completed by causing other qualified jurors to be summoned immediately.

D. The action shall be docketed and tried as other civil actions.

§ 12-1177. Trial and issue; postponement of trial

A. On the trial of an action of forcible entry or forcible detainer, the only issue shall be the right of actual possession and the merits of title shall not be inquired into.

B. If a jury is demanded, it shall return a verdict of guilty or not guilty of the charge as stated in the complaint. If a jury is not demanded the action shall be tried by the court.

C. For good cause shown, supported by affidavit, the trial may be postponed for a time not to exceed three days in a justice court or ten days in a superior court.

§ 12-1178. Judgment; writ of restitution; limitation on issuance

A. If the defendant is found guilty, the court shall give judgment for the plaintiff for restitution of the premises, for late charges stated in the rental agreement and for costs and, at the plaintiff's option, for all rent found to be due and unpaid at the date of the judgment, and shall grant a writ of restitution.

B. If the defendant is found not guilty, judgment shall be given for the defendant against the plaintiff for costs, and if it appears that the plaintiff has acquired possession of the premises since commencement of the action, a writ of restitution shall issue in favor of the defendant.

C. No writ of restitution shall issue until the expiration of five days after the rendition of judgment. The writ of restitution shall be enforced as promptly and expeditiously as possible.

§ 12-1179. Appeal to superior court; notice; bond

Either party may appeal from a justice court to the superior court of the county in which the judgment is given by giving notice as in other civil actions and filing with the justice of the peace within five days after rendition of the judgment a bond in an amount fixed and approved by the court, with sureties to be approved by the justice of the peace, payable to the clerk of the superior court and conditioned that he will prosecute the appeal to effect and will pay the rental value of the premises pending the appeal and all costs, damages and rent which may be adjudged against him.

§ 12-1180. Stay of proceedings on judgment; record on appeal

When the appeal bond is filed and approved, the justice of the peace shall stay further proceedings on the judgment and immediately prepare a transcript of all entries on his docket in the action and transmit it, together with all the original papers, to the clerk of the superior court of the county in which the trial was had.

§ 12-1181. Trial and judgment on appeal; writ of restitution

A. On trial of the action in the superior court, appellee, if out of possession and the right of possession is adjudged to him, shall be entitled to damages for withholding possession of the premises during pendency of the appeal and the court shall also render judgment in favor of appellee and against appellant and the sureties on his bond for damages proved and costs.

B. The writ of restitution or execution shall be issued by the clerk of the superior court and shall be executed by the sheriff or constable as in other actions.

§ 12-1182. Appeal to supreme court; stay and bond

A. In a forcible entry or forcible detainer action originally commenced in the superor court, an appeal may be taken to the supreme court as in other civil actions.

B. The appeal, if taken by the party in possession of the premises, shall not stay execution of the judgment unless the superior court so orders, and appellant shall file a bond in an amount fixed and approved by the court, conditioned that appellant will prosecute the appeal to effect and will pay the rental value of the premises pending the appeal and all damages, costs, and rent adjudged against him by the superior court or the supreme court.